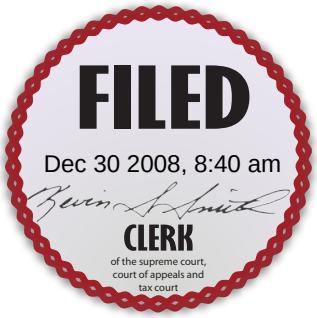

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IN THE
COURT OF APPEALS OF INDIANA

ALLEN E. VAUGHN, JR.,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 49A05-0712-PC-727
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable William E. Young, Judge
Cause No. 49G20-0201-PC-011526

December 30, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Allen E. Vaughn, Jr., appeals the post-conviction court's denial of his petition for post-conviction relief. Vaughn raises two issues, which we restate as:

I. Whether Vaughn has waived his freestanding claims of error; and

II. Whether Vaughn received ineffective assistance of trial counsel.[1]

We affirm.

The relevant facts as discussed in Vaughn's direct appeal follow. In January 2002, Indianapolis Police Department Detective Mark Campbell was working an undercover drug investigation of Vaughn. Vaughn v. State, No. 49A02-0304-CR-335, slip op. at 2 (Ind. Ct. App. Dec. 31, 2003), trans. denied. Detective Campbell twice purchased crack cocaine from Vaughn while Detective Campbell was wearing a concealed recording device. Id. at 3. After the second purchase, other officers executed a search warrant of Vaughn's apartment and discovered crack cocaine, marijuana, and the drug purchase money used by Detective Campbell. Id. at 3-4.

The State charged Vaughn with: (1) Count I, dealing in cocaine as a class A felony; (2) Count II, possession of cocaine as a class C felony; (3) Count III, possession of cocaine and a firearm as a class C felony; (4) Count IV, dealing in cocaine as a class A felony; (5) Count V, dealing in cocaine as a class A felony; (6) Count VI, possession of cocaine as a class C felony; (7) Count VII, possession of cocaine and a firearm as a class

[1] Vaughn also argues that he received ineffective assistance of appellate counsel, but does not develop the argument. Consequently, the argument is waived. See, e.g., Cooper v. State, 854 N.E.2d 831, 834 n.1 (Ind. 2006) (holding that the defendant's contention was waived because it was not supported by cogent argument or citation to authority); see also Ind. Appellate Rule 46(A)(8)(a).

C felony; and (8) Count VIII, possession of marijuana as a class A misdemeanor. A jury found Vaughn guilty of all charges except for Count III. The trial court sentenced Vaughn on Counts I, IV, VII, and VIII to an aggregate term of forty years in the Indiana Department of Correction.

Vaughn filed a direct appeal and raised two issues: (1) whether the trial court erred in its determination of a juror's proposed question to a witness during the trial; and (2) whether the trial court failed to instruct the jury as to the applicable standard of proof in the case. Id. at 2. We affirmed Vaughn's convictions. Id.

Vaughn then filed a petition for post-conviction relief, which was later amended.[2] According to the post-conviction court's findings, Vaughn's initial pro se petition alleged ineffective assistance of trial counsel, fabrication of evidence, and abuse of judicial discretion. The pro se amended petition added claims for "violation of Title II of the Omnibus Crime Control Safe Streets Act of 1968," "violation of Ind. Code 35-33.5-1-5," and "violation of Ind. Code 35-33-5-1(a)." After an evidentiary hearing, the post-conviction court entered findings of fact and conclusions of law denying Vaughn's claim. Specifically, the post-conviction court rejected Vaughn's ineffective assistance of trial counsel claim, his claim of prosecutorial misconduct in the use of fabricated evidence, his

[2] Vaughn did not provide a copy of the full chronological case summary, the initial petition for post-conviction relief, the amended petition for post-conviction relief, or the post-conviction court's findings of fact and conclusions of law in his appellant's appendix. We located the amended petition in other documents that Vaughn filed with this court. We remind Vaughn that Ind. Appellate Rule 50 requires that an appellant's appendix contain the chronological case summary, the appealed order, and pleadings necessary for consideration of the appeal.

claim of abuse of judicial discretion due to the use of fabricated evidence, and his claim of the use of illegal wiretap evidence in the trial.

Before discussing Vaughn's allegations of error, we note the general standard under which we review a post-conviction court's denial of a petition for post-conviction relief. The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004); Ind. Post-Conviction Rule 1(5). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. 810 N.E.2d at 679. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id. Further, the post-conviction court in this case entered findings of fact and conclusions thereon in accordance with Indiana Post-Conviction Rule 1(6). Id. "A post-conviction court's findings and judgment will be reversed only upon a showing of clear error – that which leaves us with a definite and firm conviction that a mistake has been made." Id. In this review, we accept findings of fact unless clearly erroneous, but we accord no deference to conclusions of law. Id. The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. Id.

I.

The first issue is whether Vaughn waived his freestanding claims of error. On appeal, Vaughn argues that the admission of Detective Campbell's recording of the drug

buys violated the Indiana Wiretapping Act, the Indiana Constitution, the Federal Wiretap Act, and the United States Constitution.

Vaughn may not raise these freestanding claims of error in a post-conviction proceeding. Rather, in "post-conviction proceedings, complaints that something went awry at trial are generally cognizable only when they show deprivation of the right to effective counsel or issues demonstrably unavailable at the time of trial or direct appeal." Sanders v. State, 765 N.E.2d 591, 592 (Ind. 2002). Here, Vaughn has not demonstrated that his arguments were unavailable at the time of trial or direct appeal. Consequently, we will not address the arguments as freestanding claims. To the extent they are raised in the context of an ineffective assistance of counsel claim, we address them below. See, e.g., Conner v. State, 829 N.E.2d 21, 26 (Ind. 2005) (holding that the petitioner's post-conviction claim "of trial court bias was not raised at trial or in [the petitioner's] earlier appeals, and [was] therefore procedurally defaulted").

II.

The next issue is whether Vaughn received ineffective assistance of trial counsel. To prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate both that his counsel's performance was deficient and that the petitioner was prejudiced by the deficient performance. Ben-Yisrayl v. State, 729 N.E.2d 102, 106 (Ind. 2000) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984), reh'g denied), reh'g denied, cert. denied, 534 U.S. 830, 122 S. Ct. 73 (2001). A counsel's performance is deficient if it falls below an objective standard of reasonableness based on

prevailing professional norms. French v. State, 778 N.E.2d 816, 824 (Ind. 2002). To meet the appropriate test for prejudice, the petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068.

Failure to satisfy either prong will cause the claim to fail. Grinstead v. State, 845 N.E.2d 1027, 1031 (Ind. 2006). Most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone. Id. However, the Indiana Supreme Court has directed that we "remain mindful that there are occasions when it is appropriate to resolve a post-conviction case by a straightforward assessment of whether the lawyer performed within the wide range of competent effort that Strickland contemplates." Id.

Vaughn alleges numerous deficiencies in his trial counsel's performance. However, the majority of Vaughn's argument seems to relate to his trial counsel's failure to challenge the use of recordings made by Detective Campbell based upon the Indiana Wiretap Act, Ind. Code §§ 35-33.5-1-1 through 35-33.5-5-6, and the Federal Wiretap Act, 18 U.S.C. §§ 2511-2519. Vaughn contends that his trial counsel "failed to suppress the evidence of the unlawfully intercepted telephone conversation, i.e. testimony and evidence" and that he "failed to object to video surveillance and the Kell Set testimony." Appellant's Brief at XXII.

"Both federal and state statutes prohibit the use of wiretapping and electronic surveillance except in certain circumstances." State v. Lombardo, 738 N.E.2d 653, 654

(Ind. 2000) (citing 18 U.S.C. §§ 2511-2519; Ind. Code §§ 35-33.5-1-1 through 35-33.5-5-6). "[T]here are important similarities between Indiana's Wiretap Act and the Federal Wiretap Act." Id. at 659. "Both provide criminal penalties for the unauthorized interception of a wire or electronic communication *without the consent of at least one of the participants*." Id. (citing Ind. Code § 35-33.5-1-5; 18 U.S.C. § 2511(2)(d)) (emphasis added).[3] The recordings made by Detective Campbell were clearly made with the consent of one of the participants, i.e., Detective Campbell. Thus, the recordings did not violate the Indiana Wiretap Act or the Federal Wiretap Act. Vaughn's trial counsel was not deficient for failing to raise the issue.

Next, Vaughn focuses upon one of the lab reports.[4] He seems to claim that his trial counsel failed to notice that the State did not provide one of the lab reports in certain discovery responses and that his counsel should have moved to suppress the lab report.

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[3] At the time of Vaughn's arrest, Ind. Code § 35-33.5-1-5 provided:

> "Interception" means the intentional:
>
> (1) recording of; or
> (2) acquisition of the contents of;
>
> a telephonic or telegraphic communication by a person other than a sender or receiver of that communication, without the consent of the sender or receiver, by means of any instrument, device, or equipment under this article. This term includes the intentional recording of communication through the use of a computer or a FAX (facsimile transmission) machine.

[4] Vaughn also argues that his trial counsel "failed to properly investigate before Mr. Vaughn's trial, this omission resulted in prejudice in the public defender [sic] decision not [sic] present a defense on behalf of the accused." Appellant's Brief at XXII. From the remainder of Vaughn's brief, it appears that this alleged deficiency relates to his trial counsel's conduct regarding the "wiretap" evidence, the "fabricated" evidence, and the lab report. As we discuss these arguments separately, we do not discuss the alleged failure to investigate.

However, the Chronological Case Summary mentions two supplemental discovery responses by the State, but Vaughn presented no evidence concerning those supplemental responses. Vaughn presented absolutely no evidence that the lab report was not disclosed to his counsel. We conclude that Vaughn has failed to demonstrate that his trial counsel did not receive the lab report.

Next, Vaughn argues that his trial counsel was deficient because he failed to notice that the police fabricated evidence. Vaughn claims that cocaine found during the search was reported by the "lab tech" to be crack cocaine when the actual substance was powder cocaine. Appellant's Brief at XXIII. In support of his assertion, Vaughn cites only the lab report, which identified the substance as crack cocaine, a detective's testimony that identifies the cocaine, and a question to the detective that notes that the cocaine "appears to be somewhat broken down" and "changed slightly." Appellant's Appendix at 29. Vaughn cites no evidence that the cocaine admitted at trial was powder cocaine or that the police fabricated evidence. As a result, Vaughn has failed to demonstrate that his trial counsel was deficient.

Vaughn also argues that his trial counsel was deficient for failing "to suppress the affidavit for search of the invasion by police entering his home without probable cause." Appellant's Brief at XXII. Vaughn mentions that Detective Campbell did not know where Vaughn lived and that "[t]here was no consent or no invite for the police to be" at

his residence. We, quite simply, cannot follow Vaughn's argument regarding the search warrant. Vaughn's argument is waived for failure to make a cogent argument.[5] See, e.g., Cooper v. State, 854 N.E.2d 831, 834 n.1 (Ind. 2006) (holding that the defendant's contention was waived because it was not supported by cogent argument or citation to authority); see also Ind. Appellate Rule 46(A)(8)(a).

Finally, Vaughn argues that his trial counsel was deficient because "he destroyed the credibility of his client and bolstered [the] state's witness." Appellant's Brief at XXII. Vaughn points to his trial counsel's cross examination of Detective Campbell in which his trial counsel elicited that Vaughn came to the attention of the police through a confidential informant. Even if we assume that his trial counsel could be considered deficient for this line of questioning, Vaughn has failed to demonstrate how he was prejudiced by this line of questioning. As the State points out, "this information has no bearing on [Vaughn's] guilt or innocence in this case." Appellee's Brief at 12.

Vaughn's freestanding claims of error are inappropriate in the post-conviction context, and he has failed to demonstrate ineffective assistance of trial counsel. As a result, we conclude that the post-conviction court's findings of fact and conclusions of law denying his petition are not clearly erroneous. See, e.g., Douglas v. State, 800

[5] Vaughn also mentions that his trial counsel was deficient for failing to object to a scale recovered after the search. However, he makes no argument concerning the scale and has waived the issue. See, e.g., Cooper, 854 N.E.2d at 834 n.1 (holding that the defendant's contention was waived because it was not supported by cogent argument or citation to authority).

N.E.2d 599, 609 (Ind. Ct. App. 2003) (affirming the post-conviction court's denial of the petition for post-conviction relief), reh'g denied, trans. denied.

For the foregoing reasons, we affirm the post-conviction court's denial of Vaughn's petition for post-conviction relief.

Affirmed.

ROBB, J. and CRONE, J. concur